Drafting a Settlement Agreement

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Dispute Resolution Continuum

ADR

Consensual (interests) & confidential

Adversarial (rights)

Negotiation Mediation Arbitration Litigation

Time and Resources

Party control
Key Issues - Outline

• Who decides how the settlement will be recorded?
• Who drafts the agreement?
• Is the agreement binding?
• Should lawyers review the settlement?
• How do the mediation confidentiality rules affect mediated agreements?

General Considerations

• Most cases settle but not all cases are capable of settlement
• Purpose of settlement is to arrive at an agreement that is satisfactory to your client consistent with law and relevant rules of professional responsibility.
• Settlement allows your client to have some control over the final resolution and may provide relief not available at trial.
Assess Settlement with your client

- Before discussing with client, lawyers must evaluate the case:
  - What is the relevant? Is client’s objective supported by law?
  - What is reasonably expected outcome?
  - What are other possible outcomes including unfavorable outcomes?
- Explain concept of settlement
- Discuss with client your evaluation
- Explain pros and cons of court litigation, arbitration and settlement

Keys to Drafting Effective and Enforceable Agreements

Do your due diligence – Key considerations:
- Settlement agreements as beginnings and/or ends
- Understand your & your opponent’s needs
- Draft lasting robust clauses
- Engage the experts
Settlements as End Points

- No continuing obligations
- Lump sum payments
- No monitoring requirements
- Arbitration clauses
- Liquidated damages
- Press releases/non-disclosure clauses

Press Releases / Non-Disclosure Clauses

Only where possible and/or necessary

- Do not leave to the last minute
- Corporate clients: Clear through all channels
- Manage disclosures
Settlement Agreements as Beginnings

- Take time to understand opponent’s goals & needs
- Know your goals:
  - Being free of future litigation / arbitration
  - Ongoing relationship/joint venture
- Draft to all parties’ goals
  - Engage lawyers

Knowing the Parties’ Needs – Due Diligence

- Understand your clients needs & limits
  - Define wins & break evens
- Robust discussion before drafting
  - Avoid “lawyerly” hang-ups
- Do not just exchange revisions - DISCUSS
Draft Robust Binding and Enforceable Clauses

- Do not skimp on dispute resolution:
  - Arbitration
- Confidentiality/non-disclosure
  - Know your limits
  - Set limits your Client & opponent can meet
    - Public reporting
- Press releases
  - Draft & approve early
  - Approve language & timing
- Avoid legalese

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General Drafting Terms

- Record facts that have brought parties to the point of settlement
- Mutual Releases: A broad release of all claims each party has against the other. Do not release potential claims that might arise in the future especially if parties have an ongoing relationship
- Each party to bear their own costs and lawyers' fees.
- Be aware that the settlement may result in tax consequences to you client
- Signature lines for client and counsel

INVESTOR-STATE MEDIATION
Key Issues

- Who can negotiate on behalf of the state?
  - State representative
  - Law firm
  - Others?
- Who can authorise settlement?
  - Government committees
  - DPM
- Who can authorise money settlement?

Emerging Institutionalisation

- ICSID
  - 9 recorded cases
  - Limited or no publicity
- UNCTAD
- IBA
  - Investor-State Mediation Project
- IMI
  - Investor State Mediation Taskforce
Recent experience

- Settlements after the arbitration has started
  - Egypt
  - Oman
  - others
- Settlements before arbitration has started
  - VERY RARE!
  - Nigeria
- Settlement after the arbitration has been completed
  - Argentina

Key problems

- States are very reluctant to settle if the settlement includes a money obligation on their part
- Most common settlement would be a renegotiation of concession agreement
- States use settlement for reasons of confidentiality (and safeguarding their credit rating)
- Reluctance to use ISM in BITs and other IIA
Way forward

- It is important for states to develop a DPM (Dispute Prevention Mechanism), typically an inter-ministerial committee that monitors investments and assesses risks in relation to disputes
  - UNCTAD work
  - From Panama to Korea

Any Questions?

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